Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Paul Brickner,
Petitioner

v.

George Voinovich, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the District Court's denial of petitioner's allegation, through a Rule 60(b) motion, that there had been fraud upon the court, because the operative fact of the District Court's original 1991 decision was false, without balancing or addressing equitable considerations bearing on the reasonableness of a delay in filing:

A. the fundamental principle of separation of powers, here violated by the highest ranking state executive branch members (the Governor and the Attorney General) through their usurpation of a power that the Ohio Constitution reserves exclusively to the two highest levels of the judiciary (the Supreme Court and the courts of appeals), namely the power to decide through a pre-removal quo warranto action, the legal question of whether or not a duly elected and seated official holds office lawfully;

B. the importance of the fraud alleged, i.e. that someone conveyed to the court the false and bogus operative "fact" that there had been a declaration of vacancy of the seat of an elected office holder by the Governor and the Attorney General, whereas (1) the Governor and Attorney General had no power or authority to declare a vacancy, and, (2) in fact, there was no declaration of vacancy;

C. the seriousness of the second aspect of the fraud, namely the failures to disclose where there was a duty to disclose, failures that actually perpetuated the falsehood and impliedly adopted and endorsed the original fraud,

(1) the failures of Governor Voinovich and Attorneys General Fisher and Montgomery and their attorneys assigned to this case to disclose to three levels of the judiciary (the District Court, the Sixth Circuit and, during the pendency of the 1992 petition for a writ of certiorari, the Supreme Court) the fact that there was no declaration of vacancy, a fraud that continued from September 5, 1991 to June 21, 2000, when

an Assistant Attorney General, during oral argument, admitted that there was no declaration of vacancy,

(2) the failure to disclose that in Ohio the Governor and the Attorney General have neither the authority nor the power to declare a vacancy of a duly elected and seated public official,

(3) the failure to disclose the fact that there is no Constitutional, statutory or decisional authority in Ohio that authorizes the removal of a duly elected and seated official by "operation of law",

D. the importance of free elections to our democracy,

E. the necessity for the people or the electorate, as well as the individual officeholder, to have due process and to have the issue of fraud upon the court that removed their duly elected official heard by and considered by the courts without regard to the diligence by that elected official in bringing the Rule 60 motion,

F. Rule 60's role in protecting the integrity of the judicial process, and

G. that the principle of separation of powers permeates every level of American government, Federal, state and local, to such an extent that the purpose of the principle has become a principal part of due process of law and must be respected when considering removal of an elected official for alleged illegality, by placing the question before the courts for decision.

H. the necessity of allowing the elected choice of the people to complete an elected term without removal from office by unconstitutional means,

2. Whether the Court of Appeals erred in affirming the District Court's denial of petitioner's motion for a status conference.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Paul Brickner, is an individual citizen, who has been a member of the bars of this Honorable Court since 1982, Ohio since 1966, Virginia since 1967, the United States Army Court of Criminal Appeals since 1984, and four other federal courts, is proceeding pro se in this matter.

Respondents

George V. Voinovich, individually and in his official capacity as Governor of the State of Ohio; Chester A. Roush, individually and in his official capacity as President of the State Board of Education of Ohio; William L. Phillis, individually and in his official capacity as Acting Superintendent of Pubic Instruction; and their agents, employees, attorneys, successor in office, assistants and all persons acting in concert and cooperation with them.

None of the parties is a corporation.

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ARGUMENT 1

Review for abuse of discretion by the District Court necessarily entails an evaluation of the seriousness of the fraud, whether it was ongoing and never ended until the day of oral argument; and, in this case, consideration of whether the trial court had before her the transcript, now missing for at least a year, that contained the operative "fact" that never existed. District Court Judge Wells had "the smoking gun" (the Armstrong letter that said there was no declaration of vacancy but appears to have lacked the corpus delicti (R. 9, the missing transcript of the TRO in which the specifics of the "declaration of vacancy"

were spelled out by Judge Krenzler). Without the corpus delicti, the smoking gun letter meant little.

ARGUMENT 2

Where the operative fact of the opinion of the trial court, that the governor and attorney general acted in concert to declare a vacancy of a duly elected official, thereby allowing an appointment by the governor, and where the appellate court similarly found that the governor had declared a vacancy, and where there was no authorization for the alleged declaration in any provision of the Ohio Constitution, Revised Code or case law, and where the defendants did not allege that a vacancy was declared, a reasonable mind would conclude: once it is proven that there was no declaration, the bogus fact must be seen as the product of fraud upon the court rather than a mistake or misinterpretation by the court of some underlying information.

Moreover, the trial court erred in not holding a status conference on a matter this important and this complex.

ARGUMENT 3

Petitioner's request that the 1991 judgment be vacated for fraud against the court, although well taken, should not be denied because it is too late for petitioner to be restored to office, because that would reward the wrong doers who provided the court with false information, reward those officers of the court who failed in their duty to the court to disclose a major falsehood and defeat the right of the people to have their elected choices complete

their tenures without interference by executive branch officers that violated the principle of separation of powers by usurping the mandate of the Ohio Constitution that the appellate judiciary decides legality of an officeholders right to office.

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The Order of the United States Court of Appeals for the Sixth Circuit affirming the opinion of the district court upon the opinion of the district court (2000) is included as Appendix A. The orders of the U. S. District Court for the Northern District of Ohio denying petitioners motions for a status conference and for release from judgment or order (2000) are included as Appendices B and C, respectively.

JURISIDICTION

The United States Court of Appeals for the Sixth Circuit entered its Order affirming the judgment of the District Court upon the opinion of the District Court on June 22, 2000 (Appendix A). On September 21, 2000, this Court granted petitioner's application for an extension of time within which to file this petition for a writ of certiorari to and including November 19, 2000. This Court is authorized to hear this case pursuant to Title 28, U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOVLED

U.S. Const., 14th Amendment, § 1

....; nor shall any state deprive and person of life, liberty, or property, without due process of law; ....

Title 42, United States Code, § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ohio Constitution, Art. IV, §§ 2 and 3

§ 2 .... (B)(1) The supreme court shall have original jurisdiction in the following: (a) Quo warranto;

§ 3 .... (b)(1) The courts of appeals shall have original jurisdiction in the following: (a) Quo warranto;

Rule 60(b), Federal Rules of Civil Prodcedure

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: .... (b) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time.... This rule does not limit the power of a court to ... set aside a judgment for fraud upon the court.

STATEMENT OF THE CASE

"…. the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped." Benjamin Nathan Cardozo, Nature of the Judicial Process, p. 35, The sentence of today will make the right and wrong of tomorrow." Cardozo, supra, p. 21,

"Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments…. Truth needs no disguise…. fraud hidden for years, but now admitted. Justice Hugo Lafayette Black, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 at 244, 247 and 250 (1944),

"[Lincoln] felt like the ugly man riding through a wood who met a woman, also on horseback, who stopped and said: 'Well, for land sake, you are the homeliest man I ever saw.' 'Yes, madam, but I can't help it,' he replied. 'No, I suppose not,' she remarked, 'but you might stay at home.'" Lincoln, David H. Donald, 1995.

1. The Beginning: an exemplary exercise in democracy
2. The Sordid Controversy
3. The Fraud Against the Court, Hidden for Years
    a. the false operative fact and
    b. the failure to disclose
    c. R. 9, the transcript missing from the record

1. The Beginning: an exemplary exercise in democracy

This case has always been about principle. It has never been a suit about monetary damages.

Petitioner became an Administrative Law Judge with the Social Security Administration in November 1981, assigned to the Cleveland, Ohio office, before he became a member of the State Board of Education. Federal Administrative Law Judges are different from Article III judges and different from state court judges in Ohio. Those types of judges are subject to and governed by the Cannons of Judicial Ethics. Administrative Law Judges, formerly called Hearing Examiners, hear and decide regulatory and benefit cases for individual Federal agencies under the Administrative Procedure Act. They are qualified to serve by the Office of Personnel Management under the civil service laws and are hired by individual Federal agencies. They are subject to and governed by the Hatch Act and the same the Standards of Conduct that apply to most Federal employees. They are not subject to the Cannons of Judicial Ethics.

In the summer of 1982, petitioner decided to run for membership on the State Board of Education, after being invited to do so by community leaders. He ran the intention by the chief administrative law judge in the Cleveland office, who thought it was a good idea. He obtained and filed the necessary petition forms and signatures and was narrowly elected in a three-way race, defeating the incumbent and a third candidate. His employing agency gave him permission to perform this "outside activity". The Secretary of State issued a certificate of election and the Chief Justice administered the oath of office to petitioner and the other board members at the January 1983 board meeting.

Petitioner's term of office was six years. He was elected from the old 11th District, whose boundaries were coterminous with those of the 11th U.S. Congressional District. The district consisted of all of three counties: Ashtabula, Geauga and Portage; most of Lake County; and part of Trumbull County. The district, whose population exceeded 500,000, was located in the northeastern corner of Ohio and was bounded on the north by Lake Erie and on the east by the Pennsylvania border. Historically, it was part of the territory known as the Western Reserve of Connecticut. It included suburbs of Akron and Cleveland, farms, maple syrup producing areas, nurseries, vineyards, small cities, townships and villages. The election was non-partisan. There was no primary. Petitioner engaged in no fundraising, spent only $330.00 of his own money and viewed the election as a fine and representative exercise in democracy. Petitioner learned a great deal from the election process. At a League of Women Voters program at West Geauga High School, two women asked three questions that were eye opening and enlightening: "Does the State Board of Education serve a useful purpose? Is the Board a rubber stamp for the department? Does the tail wag the dog?" They then limited their inquiry to the incumbent.

At the 1987 organizational meeting, petitioner was elected Vice-President of the Board. In November 1988, he was re-elected to a six-year term from the same district, increasing his expenditures to $880.00 and his vote total from under 40,000 to over 100,000, or nearly 75% of the total vote, again in a three-way race and again with the approval of the agency. At the organizational meeting in January 1989, Petitioner was elected President of the Board for the years 1989 and 1990. The Board conducted formal meetings monthly, except in February and August, on the second Monday of the month. On preceding Sunday afternoons and evenings, the Board met informally. The

Board was made up of 21 elected members, one from each of Ohio's Congressional districts. In the summer of 1989, the Board elected the petitioner to serve as a member of the Commission on Education Improvement, a new small state agency.

The state Constitution charges the Board with the responsibility of hiring the state Superintendent of Public Instruction, who heads the state Department of Education. The Board's other responsibilities include setting policy, licensing and certificating teachers and school officials and revoking licenses and certificates for malfeasance and misfeasance. For additional information on the Board, and a discussion of problems that were encountered but not identified as originating in Columbus, see: Paul Brickner, "At the Crossroads: Education Reform or Revolution?", Baldwin's Ohio School Service (1990), now published by the West Group as Ohio School Law Journal.

Because of these responsibilities, it was incumbent upon the Department of Education and the state Superintendent promptly to inform the Board of significant wrongdoing.

2. The Sordid Controversy

In a "nutshell", this case is about "known fraud", or funding irregularities, in a rural school district and a nine year veteran State School Board member, who, as Board President, performed the job he was elected to do by asking serious questions about the matter, which involved at least $438,000.00. In addition, there were problems in several other local districts, one totaling over $500,000.00, with a total approaching or exceeding $1,500,000.00. In three of the districts there were allegations that Department of Education personnel from Columbus had advised the district

to falsify claims to secure funding greater than allowable. The State Superintendent, the Board's employee, did not like the questioning and sought petitioner's removal. The entire matter was embarrassing to a veteran state superintendent and carried with it overtones of serious criminal wrongdoing. The Department of Education conducted a cursory review or investigation that gave the school district a clean bill of health. It turned out to be a whitewash, because a later State Auditor's Report, that was the product of a 14-month effort, found that the rural district had to repay the state $438,000.00 obtained through false data. The State Superintendent was not forthcoming about the matter or in providing statements that turned out to have been taken during an F.B.I. investigation.

In March 1990, while petitioner was Board president, the Assistant Attorney General in charge of the education section made a presentation to the Board on Sunday evening about funding irregularities at the Ashtabula Joint Vocational School, one of more than 600 local school districts in Ohio. He did not provide a total amount, until asked: $438,000.00. He did not advise the Board that the matter was old: July 1982 through June 1987. He did not advise the Board that there had been a two-day F.B.I. investigation at the local district in March 1989 or that he was present on the first day.

The matter broke after a new superintendent took charge at the district in late 1986 and reported problems to the Department in early 1987. The problems included padding enrollment figures for adult education classes to meet threshold requirements for state funding and other falsehoods in grant requests. For example: a dog obedience class, that was ineligible for funding, was falsely labeled as a tractor-trailer trouble shooting class. In a county of 100,000, the district had a remarkable 8,000 adult education students on paper, but 400 by head count. The state Department of

Education conducted its survey and gave the district a clean bill of health. However, the new superintendent remained concerned and discussed the matter with a woman employee of the Auditor of State who was in the district on routine business. She recommended that the local school board and superintendent request a special audit. The audit was issued in the spring of 1988, 14 months later; the report found that the local district had to repay $438,000.00.

There were several other districts with fiscal irregularity problems; one totaled over $500,000.00. In three districts, including the Ashtabula JVS, there were allegations that department personnel had advised local school officials to provide false information. After the audit was released, the Ashtabula County Prosecuting Attorney sought to obtain information on possible criminal wrongdoing. He contacted the state Auditor's office, but was stonewalled. He contacted the state Attorney General's office, but was stonewalled. He turned to the local F.B.I. office in Painesville, the county seat of Lake County. The word "bogus" first appeared in print in the Painesville "Telegraph" in 1827 (OED rev.). When Board members began asking questions, the Assistant Attorney General seemed to retreat to a fall back position and advised that he would check with the attorneys and get back to the Board. He returned at the May meeting and reported no settlement could be reached.

By then, petitioner had heard from the newest local superintendent (the message bearer was gone), who advised that there were statements. Petitioner, Board President, at the time, asked the Assistant Attorney General if there were statements. He did not answer the question. Petitioner assumed that either he or the State Superintendent, who was present at the March and May meetings, would obtain and provide the statements. They were not forthcoming. Petitioner asked the state Superintendent for them on

numerous occasions. On one occasion he advised that there were no statements. Petitioner called the state Auditor's Office to ask for the statements; like the county prosecutor, the President of the State Board of Education was stonewalled. In November the new (and current) local superintendent called petitioner. When petitioner informed him that he had requested but had not received any statements, he advised petitioner to call the F.B.I. Petitioner called and received 14 pages of faxed F.B.I. statements just in time to carry them to the November board meeting.

It was much later that the F.B.I. special agent who had conducted the two-day investigation at the district informed petitioner that the Assistant Attorney General had accompanied him on the first day of the investigation. Obviously, he had first hand knowledge that there were statements. The record contained as hand written memo from the F.B.I. agent to the Assistant Attorney General that bear's an Attorney General date stamp of March 1989.

At the November meeting the Board took action to afford several local school officials an opportunity to have "due process hearings" with regard to possible revocation of their licenses/certificates. Also, the Board voted to ask the Attorney General whether Section 3301.01 of the Revised Code barred a Social Security Administrative Law Judge from serving on the State Board of Education. The voice vote was against the motion. But a call for a formal vote showed 10 for, 9 against, with one member absent. Petitioner, as Board President, could have defeated the motion by voting against, but chose to vote yes because he felt that once the issue had been raised publicly, it should be answered. The vote was necessary because individual members of a board or commission cannot ask for an opinion. The opinions are opinions do not self-execute.

AG Op. 91-001 was issued on January 8, 1991. It analyzed a portion of the relevant revised code section, 3301.031, which, at that time, read: "A member of the board shall not during his term of office hold any other public position of trust or profit...." It opined that the section meant that no government employee could be a member of the State Board of Education.

The opinion quoted the words out of context out, by leaving out the second half of the sentence from which the words came. The second half reads "...or be an employee or officer of any public or private school, or a public or private college, university, or other institution of higher learning." Those words were neither quoted nor referenced by the opinion. The second half of the sentence immediately raises the question of why the legislature chose "public position of trust or profit" as a phrase to mean employee, when they used "employee" in the same sentence? Nor did the opinion review legislative history or the history of the Board and its many members who simultaneously served as government employees. Two examples: one of petitioner's predecessors was a full time employee of the Lake County Board of Elections; another of petitioner's colleagues was a full time employee of the Cuyahoga County Auditor, during his several years of service. At the time the opinion was issued, other Board members had government positions. These included one Board member who was a member of the Navy Reserve and another who was a member of a local draft board. Neither was removed from the Board or had pay and travel withheld following the issuance of AG Op 91-001.

The Attorney General's opinion did not provide legislative history. The Attorney General did not provide the courts with legislative history. Petitioner located legislative history in time to use it in a reconsideration motion in Brickner v. Voinovich, 977 Fed.2d 235 (6th Cir.,1992). The

Manahan Report (Report of the Ohio School Survey Committee to the Governor and the General Assembly, 1955, p. 63) explained the legislative intent:

> "It was the consensus of the committee that any qualified voter should be eligible for membership on the state board of education except those who by reason of their employment or special service would be directly subject to the actions of the board and those who hold major appointive or elective offices in the state (emphasis added). This position seems in line with our democratic tradition of governmental practice, and has the backing of most authoritative opinion".

Moreover, the legislation had been passed pursuant to an amendment to Ohio's Constitution that was designed to remove the excessive influence of the Governor as the appointing authority for the state Superintendent. That amendment led to the creation of the state Board and made it the hiring authority for the State Superintendent.

Petitioner attended the January 14, 1991 meeting and presided as Board President in handing over the gavel to the incoming President. That night, petitioner attended one of the inaugural balls and met constituents from three of the five counties that he represented. They all urged petition to stay on, saying, "we elected you" and "you are doing a good job." Their comments reminded petitioner that he was a Board member as the employee of the people, not as an employee of the Governor, the Attorney General or the Department of Education. In addition, when petitioner returned to Cleveland from Columbus he encountered the Administrative Law Judge in charge, who said, "You haven't done anything wrong. You're allowed to serve under the Hatch Act. The agency gave you permission to serve."

Later that same day, he repeated those comments and added, "If I were you, I'd fight it."

When petitioner made his decision not to resign, the state Superintendent telephoned the Attorney General's office and requested a follow-up opinion. Petitioner was not advised of the request. The reply came in the form of an unpublished letter (March 7, 1991) that cited an 1892 book that relied on an 1844 Kentucky case. The letter concluded:

> "Accordingly, when the state board of education determines that a member is concurrently serving an administrative law judge, that member's office must be deemed vacated by implied resignation or abandonment. The individual is, therefore, no longer entitled to vote or receive compensation as a member of the state board of education. Further, pursuant to R.C. 3301.06, "the governor shall, within a period of thirty days, appoint a qualified person...to fill such vacancy until the next general election at which members of the state board of education are elected."

The letter was distributed to the Board members at the March 1991 meeting. Despite the letter, the Board voted to let petitioner continue to serve, vote and participate as a Board member. The actions of the Superintendent can be understood as an expression of his embarrassment at presiding over a Department that had fiscal irregularities approaching or exceeding $1,500,000.00 and the finger pointing that claimed three districts were told to falsify records by Department of Education personnel. Because of his refusal and the Attorney General's refusal to turn over the statements, petitioner, acting as Board President, had been thrust into the role of the message bearer. The state Auditor stopped paying petitioner or reimbursing him for travel and

claimed that petitioner was obliged to repay funds that he received in January, after AG Op. 91-001 had been issued.

Without informing petitioner or the Board, the Superintendent wrote a memo to the Governor, on March 8. 1991, advising that the Attorney General said the position was vacant and that under the law he had 30 days to appoint petitioner's successor. The memo carried a "cc" to the Board President, but petitioner did not see it or hear about it until after the Section 1983 action was filed on August 30, 1991.

Petitioner does not know why the Attorney General did not advise the Board and the Governor about the constitutional requirement of proceeding by quo warranto.

The Governor, on March 14, 1991, appointed a State Board member to a seat on the Ohio Tuition Trust Authority. That appointment suggests a lack of common sense in the interpretation of Ohio Attorney General Opinion 91-001.

On about March 14, 1991, petitioner held a press conference in Columbus at the Department of Education offices and called for the Superintendent's resignation. The following week, petitioner held a second press conference in Cleveland and called again for the Superintendent to resign. He announced that he was going to retire in three months for health reasons. On June 14, 1991, the Governor issued a press release on saying he "continues to search for a candidate to fill the vacancy." Months passed. The Governor appointed someone on August 21, 1991. The September meeting was about two weeks away. Petitioner, who had retained counsel, filed a Section 1983 on August 30, 1991 seeking a TRO and an injunction.

a. The false operative fact

Petitioner was removed without process. There was no declaration of vacancy, contrary to the statements of the courts. The statements of the Governor's office and the Attorney General that the position became vacant by "operation of law" provide a second suggestion that lacks due process for want of notice and an opportunity to be heard.

In order to determine whether petitioner's removal complied with the due process requirements of the 14th Amendment, the District Court Judge had to determine what procedure had been followed. On September 5, 1991 he expounded at length, before denying the TRO, he explained that the Governor and Attorney General had several procedural choices, but discussed a comparison of only two: a quo warranto action and a declaration of vacancy. On September 5, 1991, he stated that they acted in concert and chose to declare a vacancy. (Appendix G):

> "Under the facts in this case, the Governor and the Attorney General could have proceeded in at least one of several ways.
>
> "Normally, when a person is allegedly holding office illegally, a quo wrranto action could be filed. The gist of this action is to ask the question: b by what authority are you serving? In other words, there is a challenge to the person's holding office.
>
> "This litigation will be brought in state court and, during its pendency, the person having been elected to the office would retain it and, in all probability, would continue to retain it during the pendency of the litigation and until it was finally concluded.
>
> "Another way for the governmental actors to

proceed would be, as was done in this case, by declaring the seat vacant and appointing someone else to fill it. This would then place the burden on the deposed officeholder to take some action, either by his or her own quo warranto action challenging the right of his successor to hold the position, or bringing an action similar to what was brought in this case.

"In either of these latter events, in all probability the elected person, such as plaintiff, would not hold the position during the pendency of the litigation. Thus, we see a contrast in the two methods of procedure. In the first scenario, the elected person would continue to hold the office or position until it was concluded and, in the latter one, the successor-appointee would continue to hold the position, at least during the pendancy [sic] of the litigation.

....

"As an aside, this Court notes that all persons in public or private life are faced with alternatives. In this case, the state actors, namely, the Attorney General and the Governor, in concert, chose the route of declaring the seat vacant and having the Governor make a new appointment. They could have proceeded in quo warranto but they did not. This Court cannot tell government officials which of the various alternatives they must take. ....

"This Court would be remiss if it did not also note that the normal, well-accepted practice is to give notice and an opportunity to be heard before people are removed from their positions. It cannot be accepted as good practice to have people in authority merely remove people and appoint a successor and then place the burden on

that person to litigate to reclaim the position from which they have been deposed, even if the state actor is right.

"This removal process without prior proceedings or litigation would lead to abuse, in that arbitrary public officials could arbitrarily and wrongfully remove people and then place the burden on that person to reclaim the position. It may then take several years to go through the court system to reclaim the position and be successful. This system may arguably be satisfactory if the government official is right but it could lead to abuses in the event that the government official ultimately is wrong."

When he dismissed the action on November 15, 1991, he asked, one of the state attorney's on the case,

"Explain to me how or by what authority you – are now the Attorney General, Secretary of State, State Auditor and you say to some elected official, 'You are not qualified. Legally you are through,' and you just declare the job vacant and somebody has been elected. Do you think that's right?
He added, "Somebody declared it vacant."

The Sixth Circuit too said that the Governor declared a vacancy. Petitioner's post-decisional pleading advised that the Governor had no authority to declare a vacancy. Counsel for respondents remained silent. Petitioner's petitions for a writ of certiorari and for rehearing were denied in 1993. Counsel for respondents did not advise this Honorable Court that there had been no declaration of vacancy and that the Governor and Attorney General had no authority to do so.

A year or two after the litigation had concluded, petitioner sought to gain a better legal understanding of what had happed by requesting from the Attorney General the legal advise that he had provided the Governor. The Attorney General was agreeable but the Governor was not. Another year or two later, petitioner decided to seek a copy of the declaration of vacancy, believing that if it were on a printed form, it might contain an obscure reference to the Revised Code or to the Constitution. Petitioner had never heard of a declaration of vacancy being issued, but did not know everything. The only statements that there was such a declaration were made by the District Court on September 6, 1991 and November 15, 1991 and by the Sixth Circuit on October 13, 1992. Petitioner wrote four certified letters to the Governor. Ultimately, after the last certified request, the Chief Legal Counsel to the Governor provided a definitive answer: there was no declaration of vacancy. (Appendixes D, E and F)

b. The failure to disclose

Neither the Attorney General nor the Governor informed the District Court judge, following the September 6, 1991 denial of the TRO, that there had been no declaration of vacancy. Nor did the many attorneys representing the offices of the Governor and the Attorney General inform the District Court. They all failed to do so when the original District Court judge, ruling from the bench that the action was dismissed stated that "somebody declared it vacant" and "you just declare the job vacant," on November 15, 1991. Their silence sanctioned the original fraud, because they had a duty to disclose (*Demjanjuck v. Petrovsky*, 10 F.3d 338, 348, 6th Cir., 1993).

The same attorneys, including both the Governor and the Attorney General, failed to notify the Sixth Circuit either before or after that court made its erroneous finding that the Governor had declared a vacancy.

When the case was pending before this Honorable Court on a petition for a writ of certiorari, those same attorneys remained silent and did not inform the Supreme Court of the United States that there had been no declaration of vacancy as found by both the trial and appellate courts.

Moreover, although the Rule 60 motion, addressing directly the absence of a declaration of vacancy, was filed on September 23, 1998, the Attorney General waited until June 21, 2000, when the case was argued at the Sixth Circuit to admit orally that there had been no declaration of vacancy.

There are in the record two theories of how the vacancy occurred to permit the Governor to appoint a successor to the elected Board member. First is the theory of the courts: the District Court said that it was a declaration of vacancy issued by the Governor and the Attorney General; the Sixth Circuit said it was a declaration of vacancy issued by the Governor alone. Second is the theory that the position became vacant by "operation of law". Thus we have a dichotomy between the judicial determinations and the positions taken by the Attorney General and Governor. The latter two positions are consistent in that they maintain that it does not matter that there was no declaration of vacancy because the vacancy was created by operation of law and thus, there was a vacancy to be filled. However, the two determinations of how the "vacancy" arose have one thing in common: both are without supporting authority in the Constitution, Revised Code or in the Ohio decisional law.

3. Fraud Against the Court

After receiving the February 7, 1996, Armstrong letter, petitioner considered returning to court. However, he dreaded having to deal with lawyerlike sidestepping of issues and questions, sophisticated bureaucratic evasiveness and a lack of candor. "Was there a declaration of vacancy?" is a simple question, but not in court.

However, petitioner had a stroke in March 1998, at age 57, was in hospital for three weeks and was reminded of life's shortness. In September 1998, petitioner attended a conference on the Rehnquist court at the University of Tulsa law school in September 1998, heard outstanding speakers, and was reminded that principles are important and require eternal vigilance. Petitioner filed a Rule 60 motion on September 23, 1998; and a motion for a status conference on March 19, 1999 that was followed by a memorandum on April 12, 1999, in reply to the defendant's opposition to a status conference filed April 5, 1999. The court denied the status conference on April 14, 1999 (Appendix B) and the Rule 60 motion on May 13, 1999 (Appendix C).

c. R. 9, the transcript missing from the record

When petitioner checked with the clerk's office at the District Court to copy original records for the joint appendix to be filed with the Sixth Circuit, the clerk's office advised that the record was missing and then, after the record was located, advise on two occasions that R. 9, the transcript of the TRO denial in which the original District Court judge expounded on the declaration of vacancy that we now know was a false or bogus operative or central fact of his decision. Petitioner wrote to the Clerk of Courts, who once had been a law clerk to the original District Court judge and asked her to

undertake a final search. The letter went unanswered. At this writing, the whereabouts of R. 9 remain unknown.

The Sixth Circuit allowed petitioner to amend his brief on appeal to raise two additional arguments based on the missing R. 9. Permission was granted.

The case was appealed, argued in Cincinnati on June 21, 2000. The affirmation of the District Court's dismissal was filed on June 22, 2000. An extension of time to file the petition for certiorari was granted to and including November 19, 2000. This petition is filed within that time limit.

ARGUMENTS FOR GRANTING THE WRIT

Elections are the sacred rite of democracy. Americans take great pride in our system of free elections and the spread of American style democracy, with three separate but equal branches of government, to all parts of the world. But there is no point in electing office holders if the Governor or another executive branch office holder can, at will, "declare" the position vacant, thereby removing the choice of the electorate and substituting another by appointment. The right to vote is recognized by the United Nations. Indeed, a British civil rights organization won a case, in an unreported opinion, that protects the right of the homeless to vote in the United Kingdom.

Free elections are the fabric of our democracy. They make our government truly a government "of the people, by the people and for the people." Removing a seated elected officeholder in a manner inconsistent with the Constitution's guarantee of due process gives rise to the specter of a purge. Indeed, a staid newspaper used that word, "purge", and "Kremlin style tactics" in a headline to an excellent op ed

column by Mary Yost ("Columbus Dispatch", September 19, 1991).

This case has always been about principle and not about monetary damages. It is a simple case that has been made to appear complicated by the shotgun approach of the Attorney General in presenting a series of legal arguments, one replacing another as weakness in their legal reasoning became evident. Ohio's Constitution in 1851 granted the Supreme Court and the Court of Appeals original jurisdiction to hear quo warranto cases (Ohio Constitution, Article 4, Sections 2 and 3). These two simple grants of original jurisdiction reflect a complex and sophisticated understanding of the place of free elections in our democracy and the role of the principle of separation of powers as an essential underpinning of our system of government. All case law states that a quo warranto action is the only way to decide whether a seated elected official legally holds office. An excellent opinion is *Beasley v. East Cleveland*, 20 O.App.3d 370, 486 N.E.2d 859 (1984). A case decided about the time petitioner's case was being appealed allowed an elected city council member to take his seat after he was denied the position because of the city attorney's opinion. *The State ex rel. Billis v. Summers*, 76 Ohio App.3d 848, 603 NE2d 410 (1992).

This case is important to the people, because when the people elect someone to office, the right of that person to continue in service should be sacrosanct and not defeated without due process of law. There are literally thousands of elected school board members, city council members and township and village trustees in Ohio alone. These people are citizens of every type, typically elected in non-partisan elections, who serve their communities with little or no compensation. They form the fabric of our democratic

society. In *Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (1982), the Texas Supreme Court expressed it well,

> "...a fundamental principle of our republican form of government is that every officeholder remains in his position at the sufferance of and for the benefit of the public, subject to removal from office by the edict of the ballot box at the time of the next election, or before that time by any other constitutionally permissible means."

The instant case is important to people throughout our nation, because the same fundamental principles of the rule of law and separation of powers apply everywhere. Elected officials should not to be removed by executive branch officers on their own opinion of law, unless that legal opinion is upheld by or adopted by the courts in a pre-removal action. Most local officeholders faced with removal and individuals elected but denied their seats with not have the knowledge, resources or will to contest "city hall". The relator in the *Billis* case, above, was a Toledo policeman who had organizational backing. The charter of his suburban city of Sylvania prohibited municipal employees from serving on council. The state court of appeals, in an analysis that could be a model for reasoning by the state in analyzing Section 3301.031, found that he was eligible to serve. The refusal to seat Julian Bond in the Georgia senate is a similar case.

The District Court recognized the time that it might take, "several years," to litigate and be restored to office, when an office holder is removed and left with uncharted post-removal options. However, he neglected any mention of the hard facts of life of litigation, including the deference accorded the highest-ranking officials of the state, presumptions of regularity and the necessity of meeting the burden of proof in an adversarial setting. Moreover, the

necessity of proving negatives in a case such as this becomes a huge obstacle. How does one prove that there was no declaration of vacancy or that there is no authority in Ohio for the Governor and the Attorney General to declare a vacancy? It requires a higher degree of professionalism by opposing counsel than is likely to be forthcoming within the adversary system. The mandate of the people must be respected during the pendency of an action.

There are no time limits for fraud against the court. Laches do not apply. The issue, the integrity of the judicial process, is too important.

Petitioner filed a Rule 60(b) motion alleged fraud against the court by a person or persons unknown who in 1991 provided the original District Court with bogus information designed to effect the outcome of the case. The District Court in 1999 misapprehended petitioner's motion and misapprehended the distinction between fraud against a person and fraud against the court. The District Court in 1999 failed also to balance the equities in determining that petitioner's motion was untimely, without considering other factors and without regard to the right of the people to have pre-removal due process of law, free of falsehoods and fraud.

ARGUMENT 1

The Sixth Circuit failed to properly review the Order of the District Court to determine whether there had been an abuse of discretion in denying the Rule 60(b) motion for fraud against the court because of multiple factors that were more important than any alleged lack of diligence by petitioner in filing and because the Court of Appeals failed to address the question of whether the part of the record most important to a fair consideration of the motion was missing from the record and never

seen by the district court in 1998 or 1999; and failed to address whether the District Court in 1999 abused her discretion in denying a status conference.

Rule 60, Federal Rules of Civil Procedure, is a complex rule that combines procedural, jurisprudential, criminal and equitable considerations into a high principle that seeks to protect the integrity of the judicial process by permitting a finding of fraud against the court of sufficient magnitude to override considerations of finality and the principle that all litigation must one day come to a conclusion. Chief Justice Rehnquist noted that Rule 60 is to be "interpreted as a coherent whole," *United States v. Beggerly*, 524 U.S. 38 (1998). We cannot determine that a delay in filing the motion was reasonable or unreasonable unless we weigh all of the equities that are involved.

Rule 60 does not require that the perpetrator of the fraud be identified. It is sufficient that fraud has taken place. Commentaries and case law commonly speak of fraud as being perpetrated by the adverse party. Within our adversary system, perpetrators of fraud upon the court usually may be adverse parties. But that is not a requirement of the rule.

There is no reason to believe that in this case the extensive discussion by the judge of the distinctions between the removal "process" that he said was used in this case, a declaration of vacancy, and the procedure that should have been used, a quo warranto action, was a mistake. Mistakes require an underlying basis that is misapprehended or misapplied. There was no underlying factual or legal basis to this case that could lead to a mistake of this nature. There is no authority in the Ohio Constitution, in the Ohio Revise Code or in Ohio case law for a declaration of vacancy to be issued by the Governor and Attorney General, acting in concert or individually. A mistake can be seen in the 1992

Sixth Circuit opinion when the court incorrectly stated that state school board members were elected statewide. Another possible mistake was the Sixth Circuit's determination that the Governor alone, and not in concert with the Attorney General, had declared a vacancy. Since there was no declaration of vacancy in truth, there could be none in the record, except for the District Court judge's statements. Those clearly said the declaration was a collaborative undertaking, but the Sixth Circuit seemed to have erred in attributing the declaration that never took place to the Governor, but not to the Attorney General. There was no room for mistaking or confusing the law, since there was no law of declaring a vacancy to confuse or misunderstand.

Since there was no basis for mistake, the reasonable mind would conclude that the false information had been passed along to the court at some time unknown, by a person or persons unknown and by a means unknown. This case bears many resemblances to *Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322* U.S. *238* (1944), the leading case on fraud against the court. However, in *Hazel-Atlas Glass* the party bringing the motion had investigated in depth, had the resources to investigate and had substantial business justifications for doing so. The corporation determined that an adverse party was the perpetrator. In this case, petitioner is an individual who does not have the ability to replicate the investigative work behind the 1944 decision. In our democracy, few elected office holders can match the undertaking of the 1944 litigant.

After petition had filed his case alleging a denial of due process, someone (singular or plural) was determined to embellish the record by making it appear to the court that a procedure had been followed that met the requirements of due process of law. The declaration of vacancy is not found within the record, because there was none. It was fabricated

after the Section 1983 action was filed. A declaration of vacancy by the Governor and Attorney General acting in concert embraces the weighty authority of the two highest officeholders in the state. However, it never happened.

There is nothing in the orders of the District Court that tells us she saw R. 9, the missing TRO transcript. Since it was missing when the petitioner sought to obtain it for the joint appendix, it might have been missing when the record was retrieved from storage in Chicago. If the judge did not have this critical portion of the record, she could not have given the Rule 60 motion due consideration and "abused her discretion" thereby. A status conference, although discretionary, might have brought to light the fact that R. 9 was missing. When a member of the bar, an officer of the court, for over 30 years, alleged fraud in the judicial system, a court fails justice when she does not grant a face-to-face session and attempt to learn if she is missing a critical point. She should have asked for clarification, if she viewed the assertion of fraud as a "conclusion" without a foundation.

In addition, the failure of the Governor, the Attorney General and the many attorneys on the case to inform the three levels of the judiciary that there was no declaration of vacancy and no authority to issue one constitutes not only a professional breach but, by inference, an endorsement of and furtherance of the fundamental fraud. As such, their silence was fraudulent. The Attorney General who represented all parties defendant did not tell any court until June 21, 2000 that extremely important statements made by the District Court in 1991 were not true.

Since the fraud of the defendants and their attorneys was ongoing and continued until June 21, 2000, the Rule 60 motion was not unreasonably delayed.

ARGUMENT 2

Whether there was sufficient evidence of fraud against the court in circumstances leading to the belief that the court was misinformed that there was a declaration of vacancy, when there had been none, in order to effect the outcome of the case and whether the failure of the many attorneys on the case, including the Governor and the Attorney General, to inform the District Court, the Court of Appeals and the Supreme Court in 1991 and 1992 that there had been no declaration of vacancy and whether the failure of the Governor and the Attorney General to inform the District Court of the same fact in 1998 and 1999 and the failure of the Attorney General to inform the Court of Appeals in 1998 and for nearly six full months into 2000 that there was no declaration of vacancy amounted to fraud upon the court.

A comparison of the transcript of the denial of the TRO and the Armstrong letter leads to the conclusion that there was fraud against the court. There was motive of the kind we look for in criminal fraud cases. There was the over zealousness that sometimes infects the thinking of government attorneys who, in the heat of an adversarial contest, place winning above their professional duties. The cases are legion, particularly in the area of closing argument.

The declaration of vacancy discussion by the court was not the product of a mistake, but of a deliberate effort to affect the outcome of the case in the very manner that it accomplished. It has the cunning and aforethought of the wildest scheme to defraud. After the 1983 action was filed, someone saw the need to produce a "process" where there had been none and settled on this false and bogus "fact" that

became the operative or the central fact of the decision. Of course that "process" did satisfy due process.

ARGUMENT 3

Whether petitioner's request that the 1991 judgment be vacated because of fraud against the court, although well taken, should not be granted because, ultimately, it would result in a determination that petitioner was indeed serving illegally as an elected member of the State Board of Education for nine years because his two elections were a nullity.

This is not one of those cases where, on appeal, it can be said that the case should not go forward because even if there were a denial of due process the ultimate outcome would be a loss on the merits. Surely, the issues surrounding free elections in our democracy are too important.

Moreover, analysis of the entire sentence in Section 3301.031, R.C. suggests the legislative intent revealed in the Manahan Report. No high-ranking state officials were to be on the board, no one who could throw his or her weight around, such as the Governor or a member of his cabinet. That is consistent with the very purpose in amending the Constitution to take away from the Governor the power to appoint the state Superintendent and the power to exert excessive influence over the Department of Education. The history of the Board includes many members who were government employees before and during petitioner's years on the Board. The Attorney General did not discuss that history. Given the Constitutional purpose of the 1955 amendment, the legislature had no reason to seek to keep ordinary citizens off the board who happen to work for the

government. Postal carriers and employees of cities and counties have as much interest in improving education as those employed in the private sector.

CONCLUSION

Rule 60 has a role similar to that of this Honorable Court and the highest state court. High Court do not exist to provide litigants with another level of review, they exist for the purpose of rendering decisions that will clarify and establish the law by deciding important cases and settling differences among lower appellate courts. Guidance and direction, certainty and stability are the goals, for both the present and the future, so that individuals and organizations may conduct themselves according to known principles. See, Benjamin N. Cardozo, *The Jurisdiction of the Court of Appeals of the State of New York*, (2nd ed., 1909, pp. 11-12); Paul Brickner, "Kaufman's *Cardozo*: Judicial Biography as Legal History", 88 Geo. L. J. 1895 at 1906-1909 (2000).

Litigants may benefit from the vacation of a judgment, but that is incidental to the primary purpose of cleansing the law of fraudulently obtained judgments. In this case, petitioner cannot be returned to the Board. The case is not moot, because of pay and travel that has been withheld and claimed and $15,000.00 in attorney fees and court costs. Moreover, ancillary jurisdiction would allow the courts to consider these facts even if petitioner were to pass away and the Attorney General were to concede error. The public purpose of the appellate decisional law is still disturbed by a published court of appeals opinion that suggests the Governor can remove elected officials whenever it suits him or her by a declaration of vacancy, whatever that is. That case continues to be cited and must be overruled.

The entire matter needs more deliberation than the courts have given it thus far. In 1927 Secretary of State Charles Evans Hughes asked Chief Judge Benjamin N. Cardozo if he would serve as a member of the Permanent Court of Arbitration at The Hague. The Constitution of New York State provided that judges and justices "shall not hold any other public office or trust." On September 13, 1927 Cardozo wrote to "Judge" Hughes that in his opinion, "membership in the Court of Arbitration is not an office or a public trust within that prohibition." However, he declined to serve to "avoid the occasion and the possibility of debate and misconception." Obviously, "Governor" Hughes had the same understanding that the Constitutional bar would not apply to the proposed position. See Cases on Administrative Law by Frankfurter and Green (Chicago: The Foundation Press, 2nd ed., 1935) at 325-327.

Elected officials everywhere need to be protected by the law from fraud and from the usurpation of judicial functions by executive branch members. The people have a right to be at least as secure in their electoral choices as they are in their papers and possessions.

Respectfully submitted,

Paul Brickner, Pro Se
Counsel of Record

P.O. Box 73
Willoughby, Ohio 44096-0073
H (440) 942-5353
W (216) 522-4914, ext. 6013

APPENDIX A

Case No. 99-3784
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER
[filed June 22, 2000]

PAUL BRICKNER

Plaintiff-Appellant

v.

GEORGE V. VOINOVICH, Governor; CHESTER A. ROUSH; WILLIAM PHILLIS, In their official capacities and their agents, employees, successors in office, assistants and all persons acting in concert and cooperation with them

Defendants-Appellees

BEFORE: JUDGES SILER, RYAN, and CLAY, Circuit Judges.

This cause having come to be heard upon the record, the briefs and the oral argument of the parties, and upon consideration thereof,

It is **ORDERED** that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

(s)
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
[filed April 14, 1999]

PAUL BRICKNER	) JUDGE LESLEY WELLS
	)
Plaintiff	) CASE NO. 1:91 CV 1712
	)
-vs-	)
	)
GEORGE V. VOINOVICH,	) ORDER DENYING
et al.	) PLAINTIFF'S MOTION
	) FOR STATUS
Defendants	) CONFERENCE

This case is before the Court on the plaintiff's motion for a status conference. Defendant George V. Voinovich filed a memorandum in opposition, and the plaintiff filed a response to the memorandum in opposition.

The plaintiff has filed a "motion for release from judgment or order" in this long-closed case. The pendency of such a motion does not warrant holding a status conference. Nor does the plaintiff otherwise show good cause for such a conference.

Therefore, the plaintiff's motion for a status conference is denied.

IT IS SO ORDERED.

(s)

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
[filed May 13, 1999]

PAUL BRICKNER	) JUDGE LESLEY WELLS
	)
Plaintiff	) CASE NO. 1:91 CV 1712
	)
-vs-	)
	)
GEORGE V. VOINOVICH,	) ORDER DENYING
et. al.	) PLAINTIFF'S RULE 60(b)
	) MOTION
Defendants	)

This case is before the Court on the plaintiff's "Motion for Release from Judgment or Order, Rule 60(b)." Defendant George V. Voinovich filed a brief entitled "Motion in Opposition," and the plaintiff filed a reply memorandum. For the reasons that follow, the plaintiff's motion is denied. The defendant's "motion" is treated as the brief it truly is, and therefore it does not warrant a separate ruling.

The plaintiff originally filed his action because of his removal from the seat on the Ohio Board of Education to which he had been elected. After a hearing on the plaintiff's motion for a preliminary injunction, the case was dismissed by the district judge to whom it was assigned (who has since retired). The plaintiff appealed, and the Sixth Circuit affirmed.The plaintiff's motion, which refers to but makes no analysis under Fed. R. Civ. P. 60(b)(5) and (6),[1] is

[1] Fed. R. Civ. P. 60(b) provides in pertinent part:

grounded upon an asserted fraud upon the Court. The motion contends that "[t]he fraud in this case is the failure by Governor George V. Voinovich to inform the court that he had not, contrary to the statements of [the previous district judge], declared a vacancy" on the Board of Education. Motion at 6. The plaintiff bases his argument upon a letter dated 7 February 1996 from the chief legal counsel to the governor, which states in part: "As you know from your review of the records related to this case, there is no such declaration. The Governor never issued any formal declaration either verbally or in writing."

The brief in opposition argues first that this Court has no authority to consider the 60(b) motion because the case was appealed. This argument is without merit. *See Standard Oil Co. of California v. United States*, 429 U.S. 20 (1976).

The brief in opposition also argues that the motion was not filed within a reasonable time because it comes more than two years after the date of the letter which the plaintiff says demonstrates fraud. The motion is untimely, but for another reason.

The fraud asserted by the plaintiff is not the type included within the concept of "fraud upon the court." *See* 8 Charles Alan Wright, et al., Federal Practice & Procedure § 2870 (2d ed. 1995) ("Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. That cannot be the sense in which the term is used in the final saving clause of Rule 60(b).").[2]

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) ... it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[2] The savings clause provides" "This rule does not limit the power of a court to entertain an independent action to relieve

Rather, Rule 60(b)(3) is the part of the rule which applies to the plaintiff's claim of fraud; it covers "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Rule 60(b) further provides: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." The dismissal in this case was entered in 1991, and therefore the plaintiff's motion is far outside the one-year period.

Moreover, even if the motion were considered on the merits, it would fail. Nowhere does not plaintiff demonstrate that the existence or absence of a declaration of a vacancy by the governor is a significant, or even pertinent, matter. He merely asserts the conclusion that "[t]his was a constutionally [sic] operative fact." Motion at 6. In his reply, he argues that "[I]t [a declaration of vacancy] was a fabrication, an important sounding but non-existent procedure, told to the courts to cover up for the fact that I had no due process hearing...." Reply at 4. However, there was no such "cover up"; the fact that the plaintiff had no hearing and the issue of whether due process was available to him were explicitly considered by the court of appeals. *See Brickner v. Voinovich*, 977 F.2d 235 (6th Cir. 1992).

Therefore, the plaintiff's "Motion for Release from Judgment or Order, Rule 60(b)" is denied.

IT IS SO ORDERED.

(s)

UNITED STATES DISTRICT JUDGE

---

a party from a judgment, order, or proceeding, ... or to set aside a judgment for fraud upon the court."

APPENDIX D

State of Ohio
Office of the Governor
Columbus 43266-0601

(seal)
George V. Voinovich
Governor

October 2, 1995

Mr. Paul Brickner
4750 River Street
Willoughby, Ohio 44094-7820

Dear Mr. Brickner:

This is in response to your letter to Governor George Voinovich concerning your removal from an elected seat on the state board of education. The Governor has asked me, as his Chief Legal Counsel, to respond.

Ohio Revised Code Section 3301.06 describes what is to occur when there is a vacancy on the board. It states that the Governor must, within a thirty day period and with the advise and consent of the Senate, appoint a person to fill the vacant seat. There is no statutory or constitutional requirement that the seat must be "declared" vacant.

Pursuant to Attorney General Opinion 91-01, you were never eligible to take the state school board seat, therefore it was vacated by operation of law. Enclosed please find a copy of that opinion.

I understand that litigation in this matter has been concluded and trust that all of your questions have been addressed by this point.

Very truly yours,
(s)
Michael H. Watson
Chief Legal Counsel

MHW/mcc
enclosure

APPENDIX E

Paul Brickner
4750 River Street
Willoughby, Ohio 44094-7820
January 26, 1996

Maria J. Armstrong, Chief Legal Counsel
Office of Governor George V. Voinovich
The State of Ohio
Columbus, Ohio 43266-0601

Dear Ms. Armstrong:

Thank you for your letter of January 23, 1996.

Neither you, nor Governor Voinovich, nor Mr. Watson has answered my question. As attorneys, both you and the Governor must understand that you have certain moral, ethical and statutory responsibilities. Chapter 149 of the Ohio Revised Code is Ohio's open Documents, Reports and Records law. I am sure that you are familiar with the responsibility of the Office of the Governor to comply with that statute.

I read in the Cleveland "Plain Dealer," October 14, 1992 (enclosed, p. 2B LG edition) that Governor Voinovich had declared a vacancy of my elected position on the State Board of Education. I was first elected to the board in a three way race, unseating the incumbent, in 1982. In 1988, again in a three way race, I received more than 100,000 votes, or over 74% of the total. In January 1989, I was elected President of the Board for 1989-90. Recently, many people have encouraged me to seek re-election to the Board this year and have signed petitions.

This letter is my fourth certified letter request to try to ascertain whether or not Governor Voinovich did, in fact, declare a vacancy of my position. If he did, please provide

me with the date of such declaration and a copy of the declaration. I personally do not believe that he declared a vacancy. If he did not, please provide me with an unambiguous statement that the never declared a vacancy of my elected position on the State Board of Education.

My question is reasonable, straightforward, non-frivolous and direct. It calls for a direct and honest answer. It is a simple question which can be answered simply and briefly. However, neither you, nor Mr. Watson, nor Governor Voinovich has answered the question.

If you compel me to file a law suit to obtain an answer to this question, you will be doing yourself, the Governor and the people of Ohio a great disservice.

Very truly yours,

(s)
Paul Brickner

cc: G. Voinovich
certified no. P 509 731 613

APPENDIX F

State of Ohio
Office of the Governor
(seal) Columbus 43266-0601
George V. Voinovich
Governor

February 7, 1996

Mr. Paul Brickner
4750 River Street
Willoughby, Ohio 44094-7820

Dear Mr. Brickner:

This is in response to your January 26, 1996 letter concerning your removal from an elected seat on the state board of education. I believe that all of your questions have been fully addressed in correspondence as well as through your litigation of the matter.

Nonetheless, please be advised that pursuant to Attorney General Opinion 91-01, you were never eligible to take the state school board seat. Your position was vacated by operation of the laws and legal principles outline in that Attorney General Opinion and the subsequent court rulings.

There is no statutory or constitutional requirement that the Governor issue any sort of a declaration or that a seat must be somehow "declared" vacant. As you know from your review of the records related to this case, there is no such declaration. The Governor never issued any formal declaration either verbally or in writing. While the Governor may have referenced the vacancy in the process of filling the vacancy, we have no documentation establishing any such informal statements. In short answer, this offices posses no record, public or otherwise, which is responsive to your request.

I sincerely hope that this has answered your questions.

Very truly yours,

(s)
Maria J. Armstrong
Chief Legal Counsel

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
[filed September 9, 1991]

PAUL BRICKNER	) JUDGE ALVIN I. KRENZLER
	)
Plaintiff	) CASE NO. 1:91CV1712
	)
-vs-	) MEMORANDUM OF OPINION
	) AND ORDER OVERRULING
GEORGE VOINOVICH,)	PLAINTIFF'S MOTION FOR A
etc., et al.)	TEMPORARY RESTRAINING
Defendants)	ORDER

In this case, the admitted facts are that plaintiff, Paul Brickner, is a full-time federal employee, being an Administrative Law Judge. He has been and is currently a member of the State Board of Education, having been elected by the voters of the 11th Congressional District.

A question was raised sometime ago concerning the eligibility of plaintiff Brickner to serve as a member of the State Board of Education.

On January 8, 1991, the Attorney General of the State of Ohio issued Opinion No. 91-001 to Paul Brickner, President of the State Board of Education. In this opinion, the Attorney General Concluded that a person who serves as an Administrative Law Judge in the United States Social Security Administration holds a "public position of trust or profit" within the meaning of Ohio Rev. Code Ann. § 3301.031 and that such a person is prohibited from simultaneously serving as an Administrative Law Judge of

the United States Social Security Administration and the Ohio State Board of Education.

The statute relied on by the Attorney General is Ohio Rev. Code Ann. § 3301.031 which states, in substance, that a member of the State Board of Education shall not, during his term of office, hold any other public position of trust or profit.

Subsequently, on March 7, 1991, the Attorney General of the State of Ohio wrote a letter to Franklin B. Walter, the Superintendent of Public Instruction for the State of Ohio, which states, in substance, that if a person is serving as an Administrative Law Judge and has been elected to the State Board of Education, he cannot serve as a member of the State Board of Education and simultaneously as an Administrative Law Judge. Under these circumstances, the Attorney General concluded that the office as a member of the State Board of Education is vacated by implied resignation or abandonment and that the official is no longer entitled to vote or receive compensation as a member of the State Board of Education. He further notes that Ohio Rev. Code Ann. § 3301.06 provides that the Governor shall, within a period of 30 days, appoint a qualified person to fill such a vacancy until the next general election at which members of the State Board of Education are elected.

On March 27, 1991, the State Auditor notified plaintiff that he was placing a hold on any and all compensation and expense warrants due him as a member of the State Board of Education, based on the Attorney General's opinion No. 91-001.

Based on all of the foregoing, the Governor appointed a successor to the plaintiff to represent the 11th Congressional District of the State Board of Education.

Plaintiff brought the present action contending that his constitutional property right to retain his seat on the State Board of Education violated was without due process and in

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during the pendency of the case and the newly appointed person would hold it during the pendency of the litigation.

The two principal issues to be decided in the case before this Court are whether the plaintiff had a vested property right and, if so, was he denied due process.

It is the plaintiff's position that he did have a vested property right and that it was taken away from him without due process. The state's position is that he did not have a vested property right and, therefore, there was not an unconstitutional taking away of that property right without due process.

It must be noted that in all of the foregoing alternatives the issues to be decided are whether the state law, Ohio Rev. Code Ann. § 3301.031, precludes the plaintiff from sitting on the State Board of Education while he serves in his federal capacity. In other words, is his position as an Administrative Law Judge a position of profit or trust which would preclude him from sitting on the State Board of Education? Obvously, this is the same issue that would be decided in the quo warranto case in state court, or in this case involving his property rights.

As an aside, this Court notes that all persons in public or private life are faced with alternatives. In this case, the state actors, namely, the Attorney General and the Governor, in concert, chose the rout of declaring the seat vacant and having the Governor make a new appointment. They could have proceeded in quo warranto, but they did not. This Court cannot tell government officials which of the various alternatives they must take. This Court can only deal with the case before it, and that is whether this plaintiff had a constitutional right to his position and whether it was taken away without due process.

This Court would be remiss if it did not also note that the normal, well-accepted practice is to give notice and an opportunity to be heard before people are removed from their positions. It cannot be accepted as good practice to have

people in authority merely remove people and appoint a successor and then place the burden on that person to litigate to reclaim the position from which they have been deposed, even if the state actor is right.

This removal process without prior proceeding or litigation could lead to abuses, in that arbitrary public officials could arbitrarily and wrongfully remove people and then place the burden on that person to reclaim the position. It may then take several years to go through the court system to reclaim the position and be successful. This system may arguably be satisfactory if the government official is right but it could lead to abuses in the even that the government official ultimately is wrong.

But, in any event, we must deal with the present case. Civil Rule 65 provides for a temporary restraining order. In order to obtain a temporary restraining order, the plaintiff must demonstrate the following elements: (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff has no adequate remedy at law; (3) an irreparable harm may occur unless the temporary restraining order is issued; and (4) the irreparable harm the plaintiff will suffer if the temporary restraining order is not issued outweighs the irreparable harm that defendant will suffer if the temporary restraining order is issued. A temporary restraining order may be granted for 10 days and may be renewed for an additional ten days or a total of 20 days.

It is noted that the State Board of Education meets once a month. This Court has scheduled this matter for a hearing on a permanent injunction and the merits of this case, on November 15, 1991, which has been on an expedited basis.

To give this plaintiff a temporary restraining order would allow him to sit as a member of the Board of Education for the September 1991 meeting. After that, he would not be able to sit. So, to give the plaintiff a temporary restraining order would be a meaningless gesture. The state

actors, the Governor and the Attorney General, have taken their action. The plaintiff has brought this litigation and this Court will process this case as expeditiously as possible to answer the principal question of whether this plaintiff had a constitutionally vested right in the position and whether it was taken away without due process. As stated before, this is the same issue that would be resolved in the quo warranto case.

Obviously, as a federal court, we would prefer to have these types of matters resolved in state court, and the better procedure would have been to bring the quo warranto action either before or after the removal.

Because this Court is dealing with a substantive due process issue, the fact that the plaintiff may have an adequate remedy in state court does not deny jurisdiction to this Court to process and conclude this case. This Court has concluded that the plaintiff has not met all of the elements required in order to issue a temporary restraining order.

Based on all the foregoing, the motion for a temporary restraining order is overruled. This case is scheduled for a hearing on the merits on November 15, 1991, at 9:30 a.m.

(s)

UNITED STATES DISTRICT JUDGE

Steven Steinglass
Patrick Devine
Christopher Culley

APPENDIX H

(hand printed)

4/20/98

CHRIS,
JUST A SHORT NOTE
The ASST UNITED STATES
Attorney has decided that
even with the known
fraud on Jamieson, et al
the govt will not prosecute –
no monies to individuals –
no case –
We are out of it –

Lloyd

[bordered block stamp]
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HUMAN SERVICES SECTION